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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

[illegible] MOORE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Appellants,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF APPELLANT, ROBERT GOTTFRIED

LOUIS HALLE,
Attorney for Appellant,
Robert Gottfried.

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Supreme Court of the United States

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED, Appellants, *against* UNITED STATES OF AMERICA, Respondent.	October Term, 1937.

BRIEF ON BEHALF OF APPELLANT, ROBERT GOTTFRIED

Opinion Below

The opinion rendered by the Circuit Court of Appeals (R., pp. 327-332) is reported in 90 Fed. (2), page 630.

Jurisdiction

The order of the Circuit Court of Appeals affirming the judgment of conviction was entered May 21, 1937 (R., p. 332). The petition for a writ of certiorari was granted on October 11th, 1937 (R., p. 333). The jurisdiction of this Court rests on Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether the Government in a Federal criminal trial may introduce into evidence telephone messages intercepted by Government officials in violation of Title 47, U. S. C., Section 605.

Statute Involved

The statute involved (Title 47, U. S. C., Sec. 605), will be found in the Appendix, *infra,* page 15.

Statement

The appellants above named were charged in three counts contained in an indictment, to wit; Count I, with smuggling into the Port of New York, 1,800 cases of alcohol on March 17th, 1936, in violation of Title 19, United States Code, Section 1593A; Count II, with having possessed and concealed same thereafter, in violation of Title 19, United States Code, Section 1593B; Count III, with having conspired together with others to do these acts, in violation of Title 18, United States Code, Section 88. The conspiracy charged in the third Count, covered a period of time from October 15th, 1935, to May 15th, 1936 (R., pp. 2-7).

Upon the trial, the Government to prove its case on each of the three counts, called as witnesses a number of Federal Agents, who testified regarding conversations which they listened in to over tapped telephone wires.

The Assistant United States Attorney in charge of the prosecution stated the following (R., p. 138):

> "Mr. Dunnigan: No, 231 out of these 504 which the witness on the stand now would testify to. I have selected 72 out of 504. 700 wire taps were made.
>
> The Court: How many has this witness?
>
> Mr. Dunnigan: 72."

The witness, John Picarelli, an Investigator of the Alcohol Tax Unit, who intercepted the messages referred to by Mr. Dunnigan, testified (R., p. 131):

> "I was listening to conversations over a tapped wire."

He further testified (R., p. 181):

> "I was located when I tapped this wire at 134 Mulberry Street."

The witness Joseph A. Kozak, another Investigator of the Alcohol Tax Unit, stated (R., p. 187):

> "I intercepted and overheard probably several thousand, but recorded approximately 85 conversations."

This witness further stated that he did not have permission from the defendants to intercept or listen in, and that the wires were tapped by Government officers (R., pp. 192-193).

The Circuit Court in its opinion with regard to the telephone messages stated as follows (R., p. 329):

> "Of these all are merely frivolous except those which relate to the introduction into evidence of information obtained by wire tapping. It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while government agents were (fol. 462) listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question."

Section 605 of Title 47 legislates as to two distinct portions. The first portion refers to a person who receives or assists in receiving, or transmits or assists in transmitting the message which such person is prohibited from divulging, and it is as to that person who receives the information lawfully and in the course of the duties of his employment that provision is made for the divulging of the information received by him, pursuant to a subpoena.

The second portion of that section refers to a person who intercepts a message and as to him the statute clearly states he shall not divulge it to anybody. As to such interceptor, the section is silent about divulging under a subpoena. If Congress intended that such information should be available from an interceptor of a message pursuant to a subpoena, it would have inserted a clause about subpoenaing such information, the same as it did with respect to the first portion of the section, with respect to a person who lawfully receives the communication in the course of his employment.

As to whether the first portion which provides for the divulging of information under subpoena applies only to a subpoena in a civil case or whether it also includes the divulging pursuant to a subpoena in a criminal proceeding against the sender of such message, is not before the Court in this proceeding because the information which was divulged upon the trial herein was given by an interceptor.

That part of the statute which is pertinent to this question, provides that:

> "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."

The part of the Statute pertinent to the issue raised by the appellant Gottfried, prohibits anyone from intercepting a communication and divulging or publishing the existence, contents, substance, purport, effect or meaning of such communication to any person not authorized by the sender. This section aims to prevent wire tapping, and to prevent the divulging or publishing of any knowledge so gained, unless the person sending such message consents thereto.

Section 501 of the same title, provides the penalty for violating the provisions of Section 605. Section 501 will be found in the Appendix, *infra*, page 16.

Specification of Error to be Urged

The Circuit Court of Appeals erred in holding that statements made over telephone wires by the appellants which were intercepted by Government agents, in violation of Section 605, *supra,* were competent evidence against them.

SUMMARY OF ARGUMENT

POINT I

The Court below erred in construing that Section 605, supra, permits the admissibility of messages intercepted contrary to its provisions.

It is undisputed that the telephone wires over which the appellants spoke were tapped without their knowledge or consent. It is also conceded that this was done by Government agents (R., pp. 192-3).

The Circuit Court held in affirming the conviction that the case of *Olmstead* v. *United States,* 277 U. S. 438, 72 Law Ed. 944, was controlling, notwithstanding the later enactment of Section 605, Title 47, because that statute:

> "is silent as to the admissibility of messages intercepted contrary to its provisions. As Congress did not see fit to adopt the suggestion of direct legislation to make such evidence inadmissible, we are, of course, bound to enforce the law as declared in the above cases. That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide" (R., p. 331).

In the Olmstead case, *supra* (at p. 465), this Court stated with reference to the secrecy of telephone messages, as follows:

"Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the Courts may not adopt such a policy by attributing an enlarged and unusual meaning to the 4th Amendment."

"In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it."

Counsel submits that the subsequent enactment of Section 605, *supra,* making telephone messages secret and by Section 501 prescribing the penalty for a violation thereof, Congress did the very thing which this Court suggested it could do to make telephone messages secret, and said legislation is therefore controlling in the case at bar.

The Federal Statute differs from the Washington State Statute [Appendix, *infra,* p. 17] for it not only prohibits wire tapping, but also prohibits divulging or publishing the message without the consent of the sender. Furthermore, the Court in the Olmstead case, expressed the view that the Washington State Statute could not affect the rules of evidence applicable in Courts of the United States.

The following cases are submitted as to the effect the Courts should give to acts of Congress:

Lincoln v. *Ricketts,* 297 U. S. 373, at page 376:

"In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation. Ozawa v. United States, 260 U. S. 178, 180, 194, 67 Law Ed. 199, 209, 43 S. Ct. 65; Ohio v.

Helvering, 292 U. S. 360, 370, 78 Law Ed. 1307, 1310, 54 S. Ct. 725."

Gulf States Steel Company v. *U. S.*, 287 U. S. 32, 77 Law Ed. 150, at page 45:

"When possible, every statute should be rationally interpreted with the view of carrying out the legislative intent."

Fong Yue Ting v. *United States*, 149 U. S. 698, 37 Law Ed. 905, at page 712:

"As long ago said by Chief Justice Marshall, and since constantly maintained by this court: 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'" "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power." McCullough v. Maryland, 17 U. S. 4 Wheat. 316, 421, 423 [4, 579, 605]; Juillard v. Greenman, 110 U. S. 421, 440, 450 [28, 204, 211, 215]; Ex parte Yarbrough, 110 U. S. 651, 658 [28, 274, 276]; Re Rapier, 143 U. S. 110, 134 [36, 93, 102]; Logan v. U. S. 144 U. S. 263, 283 [36, 429, 435].

At page 720:

> "In our jurisprudence, it is well settled that the provision of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, * * *."

At page 731:

> "* * *, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Commissioner of Immigration v. *Gottlieb,* 265 U. S. 310, 68 Law Ed. 1031, at page 313:

> "But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences."

Ex Parte Public National Bank, 278 U. S. 101, 73 Law Ed. 202, at page 104:

> "But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word."

In view of the foregoing decisions, counsel submits that the only reasonable construction that may be accorded Section 605, *supra,* is, that the messages should not have been allowed into evidence, when it appeared that the wire-tapping and intercepting was done without the consent of the

appellants. The other construction, to wit: that the evidence although illegally obtained may be divulged in Court, will deny to the sender of the message the right of secrecy given to him by the Statute, nullifying the protective cloak intended by Congress to be thrown around the secrecy of telephone messages.

In the Olmstead case, at page 464, the Court ruled that the case of *Ex Parte Jackson,* 96 U. S. 727, 24 Law Ed. 877, did not apply, because:

> "The United States takes no such care of telegraph or telephone messages as of mailed sealed letters."

Counsel submits that this ruling is no longer controlling, as Section 605, *supra,* gives the same right of secrecy to persons to telegraph and telephone messages as Section 259, Title 39 [Appendix, *infra,* p. 17] gives to persons to sealed letters sent through the mails. The Court in the Jackson case, *supra,* at page 733, states the following:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."

In the *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 64 Law Ed. 319, at page 392, the Court states:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independ-

ent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

The foregoing applies with equal force here, for in the case at bar, it is conceded that the wire tapping was done by a Government Agent, and the knowledge of the contents of the message was acquired in a manner forbidden by Section 605, *supra*.

POINT II

The defendants' rights under the fourth and fifth amendments were violated by allowing into evidence the contents of the messages illegally acquired by Government officers.

Prior to the enactment of Section 605, a person was not entitled to the secrecy of messages sent over the telegraph or telephone wires. Olmstead case, *supra*. Since the enactment of that statute, this right of secrecy became a personal right which only the sender of the message could waive, and any one divulging or publishing such message without his consent is guilty of an offense punishable by fine and imprisonment. This part of the Statute does not except any place where the message may be published or divulged, nor does Section 501 except any person from punishment for such violation.

Under Article 6 of the Constitution, Clause 2 [Appendix, *infra*, p. 16] the laws of the United States are as much the Supreme Law of the Land, as the Constitution, and when Congress enacted Section 605, *supra*, it gave to persons that right of secrecy to messages. It follows that this right is violated when a Government official is permitted on the witness stand to divulge the contents of any message illegally obtained by him.

In *Boyd* v. *U. S.*, 116 U. S. 616, at page 630), 29 Law Ed. 746, the Court in discussing the rights of persons under the

4th and 5th Amendments [Appendix, *infra,* pp. 16-17 to the Constitution, states as follows:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

In the case of *United States* v. *Lefkowitz,* 285 U. S. 452; 76 Law Ed. 833, at page 466, on the same question, the Court states:

> "The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In Boyd v. United States, *supra* (116 U. S. 630, 29 Law ed. 751, 6 S. Ct. 524), this Court said: 'The principles laid down in this opinion (Entick v. Carrington) affect the very essence of constitutional liberty and security. * * * They apply to all invasions on the

> part of the Government and its employees of the sanctity of a man's home and the privacies of life. * * * Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other.' "

In the *Silverthorne Lumber* case, *supra*, the Court at page 391, states:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words."

There is no distinction between studying papers illegally seized and using the knowledge obtained therefrom, and listening in over a telephone, making notes of the conversation and then divulging the contents thereof on a witness stand.

Not only was this evidence incompetent by reason of it being obtained by Government officers in violation of Sec-

tion 605, *supra*, but also because of the invasion of the Constitutional rights of the appellants.

In *Weeks* v. *U. S.*, 232 U. S. 383, 58 Law Ed. 652, the Court in construing the rights of persons when they are interfered with by the Government and its officers, states the following at page 394:

> "This protection is equally extended to the action of the Government and officers of the law acting under it. Boyd case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. To sanction such proceedings, a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

In the *Gouled* v. *United States*, 255 U. S. 298, 65 Law Ed. 647, case, there were two questions before the Court:

First:

> "Is the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the government of the United States, a violation of the 4th Amendment?"

Second:

> "Is the admission of such paper in evidence against the same person, when indicted for crime, a violation of the 5th Amendment?"

Both of these questions were answered by the Court in the affirmative.

There is no material distinction in the Gouled case from the facts in the case at bar, wherein it appears that a Government official, in violation of Section 605, tapped the wires, intercepted the message and testified to the contents

thereof in the trial against the defendant. There is no material difference between what a person writes on a piece of paper or what he says over the telephone, where the privacy of each is protected by the law.

Conclusion

For the reasons advanced, it is submitted that the judgment of conviction of the Court below should be reversed.

LOUIS HALLE,
Attorney for Appellant,
Robert Gottfried.

Appendix

Section 605, Title 47, U. S. C.

Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto:

Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, Section 605, 48 Stat. 1103.)

Section 501, Title 47, U. S. C.

General penalty.

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both. (June 19, 1934, c. 652, Section 501, 48 Stat. 1100.)

Article 6 of the Constitution, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

FOURTH AMENDMENT TO THE CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT TO THE CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

WASHINGTON STATUTE

Section 2656.

"Every person—

(18) Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line, shall be guilty of a misdemeanor. (L. '09, p. 1016, Section 404.)"

Section 259, Title 39, U. S. C.

Mail of persons conducting lotteries or fraudulent schemes returned; evidence of agency. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot,

chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift, enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself. (R. S., Section 3929; Sept. 19, 1890, c. 908, Section 2, 26 Stat. 466; Mar. 2, 1895, c. 191, Section 4, 28 Stat. 964.)